

CALIFORNIA STATE LANDS COMMISSION

IBLA 79-549

Decided September 29, 1981

Appeal from a decision of the California State Director, Bureau of Land Management, denying a protest to wilderness study area designations in the California Desert Conservation Area.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness

Sec. 603 of the Federal Land Policy and Management Act directs the Secretary of the Interior to review those roadless areas of 5,000 acres or more and roadless islands of the public lands, identified during the inventory as having wilderness characteristics, and report to the President his recommendation as to the suitability or unsuitability of each such area or island for preservation as wilderness.

2. Administrative Procedure: Generally--Appeals--Rules of Practice:
Appeals: Standing to Appeal

Under 43 CFR 4.410, a party must be adversely affected by a decision of an officer of the Bureau of Land Management in order to have the right to appeal to the Board of Land Appeals.

3. Federal Land Policy and Management Act of 1976: Wilderness--
Rules of Practice: Appeals: Generally

Where the definition of "road," utilized in the Wilderness Inventory Handbook,

cannot be said to be contrary to the statutory language or legislative intent manifested in sec. 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976), decisions employing such definition will not be set aside on appeal unless it can be shown that it was improperly applied.

4. Federal Land Policy and Management Act of 1976: Wilderness

The Bureau of Land Management can regulate the route and method of state access to lands in a designated wilderness study area in order to prevent impairment of wilderness characteristics under sec. 603(c) of the Federal Land Policy and Management Act of 1976, so long as such limitations do not impair full economic development of state school lands and lands chosen in lieu thereof.

APPEARANCES: Harley F. Pinson, Esq., California State Lands Commission, Sacramento, California, for appellant; Dale Goble, Esq., U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management; Laurens H. Silver, Esq., Sierra Club Legal Defense Fund, Inc., San Francisco, California, for intervenor.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of California appeals from a June 14, 1979, decision of the California State Director, Bureau of Land Management (BLM). This decision rejected appellant's protest to the designation and management of wilderness study areas (WSA's) in the California Desert Conservation Area (CDCA).

[1] Section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976), directs the Secretary of the Interior to review all public land roadless areas in excess of 5,000 acres, or roadless islands, which possess wilderness characteristics, and to determine their suitability or unsuitability for wilderness designation and report these determinations to the President. This process consists of the inventory phase, the study phase, and the reporting phase. The inventory phase is ordinarily a two-step process: An initial inventory to eliminate those lands which clearly and obviously do not possess wilderness characteristics and an intensive inventory of the remaining lands to determine which should be designated as WSA's. The wilderness review timetable for lands in the CDCA was

accelerated pursuant to section 601(d) of FLPMA, 43 U.S.C. § 1781(d) (1976), which mandated "a comprehensive, long-range plan for the management, use, development, and protection of the public lands within the California Desert Conservation Area." On March 30, 1979, the California State Director, BLM, published a list of the areas within the CDCA which were designated as WSA's (44 FR 19044 (Mar. 30, 1979)). Appellant generally protested the designation of WSA's in the CDCA and particularly BLM management of the parcels adjacent to and surrounding certain state holdings. The State Director, by decision of June 14, 1979, rejected the protest. This appeal followed.

California reiterates on appeal those arguments presented in its protest to BLM. First, it argues that designation of WSA's threatened completion of California's indemnity selections for deficiencies in School grants under 10 Stat. 244, 43 U.S.C. § 851 (1976). The State contends that the Bureau's actions under FLPMA and the Wilderness Act, 16 U.S.C. § 1131 (1976), are limited by the terms of the grants of school lands to the State. Second, because section 701 of FLPMA, 90 Stat. 2786, provides protection to "valid existing rights," the exercise of indemnity rights should be exempt from the application of FLPMA. Third, BLM's definition of "roadless" is inconsistent with congressional intent. Fourth, BLM has not adequately considered and provided for state management of state inholdings within the CDCA. Fifth, BLM should modify the WSA designations of eight specific parcels to facilitate development of their mineral resources.

The Solicitor's Office and the Sierra Club, which intervened in this appeal, filed briefs disputing virtually all of the State's contentions, particularly arguing that the State, in the absence of a specific indemnity application, lacked standing to pursue the appeal before this Board. Because the issue of standing is inextricably intertwined with the substance of the first two arguments pressed by the State, they will be considered together.

The State's argument proceeds as follows. Congress, in section 6 of the Act of March 3, 1853, 10 Stat. 244, granted to California sections 16 and 36 for use in support of its public schools. Section 7 of the Act authorized the State to select land in lieu of land within sections 16 and 36 which had been appropriated, by various methods, prior to survey. This Act paralleled a number of Acts directed toward specified states. With regard to lieu and indemnity sections for prior appropriations or natural shortages, Congress, by the Act of February 26, 1859, 11 Stat. 385, enacted a general provision. This was amended a number of times, particularly by the Act of February 28, 1891, 26 Stat. 796. It is presently codified as 43 U.S.C. § 851 (1976).

By these Acts, Congress solemnly compacted with California and other states to make good any deficiencies which occur in the granted school sections. At the present time, both BLM and the State agree that in excess of 100,000 acres of land remain due the State of California. 1/

1/ The State alleged a right to 127,000 acres in its protest letter of May 7, 1979. The State Director's decision argued that the total acreage presently owed was only 116,340 acres. For the purposes of this decision, this difference is not relevant.

The question which the State poses is whether classification of land as a WSA can be used to bar selection under the indemnity statutes. Noting that the response of the State Director to its protest indicated that land within the WSA would not be available for satisfaction of any indemnity claims, the State argues that this, in effect, violates a valid existing right of the State, and therefore is contrary to section 701(h) of FLPMA.

This contention, however, does not withstand close analysis. Initially, we would note that the cases originally cited by California, particularly Payne v. New Mexico, 255 U.S. 367 (1921) and Wyoming v. United States, 225 U.S. 489 (1921) are simply inapposite. These two cases involved the question of the authority of the Secretary to reject selections which were allowable when the selection was made. As both the Solicitor's Office and the Sierra Club have pointed out, there is no state selection involved here. Rather, the state is contending that because it might, at some time in the near or distant future, decide to select land proposed for inclusion within a WSA, the very act of placing these lands within a WSA has violated "a valid existing right." There are a number of difficulties within this analysis.

First of all, unlike the place grants of the school sections themselves, the lieu lands were not in praesenti grants. Slade v. Butte County, 112 P. 485, 486 (Cal. Ct. App. 1910). Rather, they required identification before any right could attach. Thus, even prior to the enactment of section 7 of the Taylor Grazing Act, 48 Stat. 1272, as amended, 43 U.S.C. § 315f (1976), a state could acquire no right to a specified parcel of land, under the indemnity provisions, absent a valid selection. Even without considering the provisions of the Taylor Grazing Act it would, therefore, be difficult to support the State's argument. 2/

2/ Indeed, the State's position becomes increasingly untenable when one considers the logical consequences of its argument. If, indeed, the State has some vested right not to have its choice of possible lieu lands in any way impaired, it becomes difficult to see how any withdrawal, disposition, or appropriation by the Federal Government of the public lands could occur until a State had fully selected all lieu and indemnity lands to which it was entitled. The United States would be rendered impotent to reserve or to dispose of Federal land. The fact that FLPMA expressly provided for the protection of valid existing rights is of virtually no import since, not only does virtually every action withdrawing or appropriating land contain the phrase, but it is doubtful that, even in its absence, any action adversely affecting a valid existing right could legally occur without proper compensation. In any event, a Pickett Act withdrawal prior to survey was held to be an appropriation preventing title from vesting to numbered school sections in United States v. Wyoming, 331 U.S. 440, 443-44 (1947). If this did not violate a prior existing right, it is difficult to see how a withdrawal of land prior to selection can be so held.

The essential difficulty with this argument becomes even more apparent when reviewed in light of the Supreme Court's recent decision in Andrus v. Utah, 446 U.S. 500 (1980), which held that classification, under section 7 of the Taylor Grazing Act, that the land as suitable for school selection purposes was a prerequisite to the right of indemnity selection. To the extent that affirmative classification by the Secretary is necessary to the exercise of indemnity rights by the states, it becomes obvious that the State can claim no right to nonclassified, much less nonselected, federally-owned lands within the State.

Inasmuch as a state has no right in the absence of a selection to limit appropriations of the public lands, the only serious claim which could arise would be dependent upon the nonavailability of other lands in California to satisfy its indemnity rights. In other words, if by these designations herein, sufficient unappropriated public land in California no longer existed to satisfy the State's indemnity rights, it might well be argued that the State's rights would operate to prevent or limit wilderness designation. However, as the State Director noted in his denial of the protest, not only are there millions of acres outside of WSA's in California, but over 300,000 acres have already been identified as available for satisfaction of its outstanding claim. Thus, the State's objection on this ground must fall. 3/

[2] With respect to the standing of the State of California to pursue this appeal, while we have ruled that the State's substantive claim cannot stand, the nature of its argument was such that, by its internal logic, no selection was necessary to claim adversity in the decision below. We are cognizant, of course, that the question of when a party is "adversely affected by a decision" cannot depend on that party's subjective determination. Nevertheless, where, as here, at least colorable allegations of injury exist, the existence of standing cannot be made dependent upon ultimate substantive success on appeal.

[3] The State also objects to the definition of "road" used by BLM in determining roadless areas subject to review. The term "road"

3/ In a subsequent pleading, the State slightly altered its position by arguing that not only did section 701(h) preserve its rights, but that, more importantly, its rights are expressly recognized in 701(g)(6). That provision provides that nothing in FLPMA shall be construed

"as a limitation upon any State criminal statute or upon the police power of the respective States, or as derogating the authority of a local police officer in the performance of his duties, or as depriving any State or political subdivision thereof of any right it may have to exercise civil and criminal jurisdiction on the national resource lands; or as amending, limiting, or infringing the existing laws providing grants of lands to the States." The problem with the State position, of course, is that this provision too is dependent on what the "existing laws" regarding state selections are. To the extent that the Supreme Court's decision in Andrus v. Utah, supra, undermines the State's argument relating to section 701(h) it has the same effect with regard to section 701(g)(6).

is defined in the Wilderness Inventory Handbook (WIH), OAD 78-61, as follows: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." WIH at 5.

The State argues that the effect of this definition is to focus emphasis on the means of maintenance used rather than on the road itself. This, it argues, is contrary to the definition accorded the term "wilderness" in the Wilderness Act, 78 Stat. 890, 16 U.S.C. § 1131(c) (1976), which emphasized the objective view of the condition of the land, viz., that it be "wild."

The problem with the State's argument is that, as both the WIH and the Solicitor's Office make clear, the definition of "road" utilized in the WIH is taken from the legislative history of FLPMA. See H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976). As the Solicitor points out, the definition was included in the report at the urging of Congressman Steiger of Arizona who wished to differentiate "ways" created by the mere passage of vehicular traffic, from roads which were maintained and improved by various mechanical means. 4/

It is impossible for us to find that the definition of "road" set forth in the WIH, and utilized herein, is contrary to the legislative intent of Congress or to the specific terms of FLPMA. Thus, we must reject the State's contention on this point.

[4] Finally, the State argues that insufficient provision has been made for access to its in-holdings within the WSA designations and argues specifically that eight modifications of WSA designations should occur.

With regard to the first question, while it is our view that some access must be afforded a state to reach its inholdings, such access is subject to reasonable regulation by BLM. As we noted in Union Oil Co. (On Reconsideration), 58 IBLA 166 (1981), no party has a right to insist on a specific route of access across Federal land. See also Montana Wilderness Assoc. v. United States Forest Service, 496 F. Supp. 880, 889 (D. Mont. 1980); Utah v. Andrus, 486 F. Supp. 995, 1009 (D. Utah 1979). In any event, such questions as the reasonability of access can only be determined in specific factual milieus. In the absence of specified concerns or injury, generalized allegations cannot be considered.

4/ See Transcript of Proceedings, Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-33.

The State did, indeed, advert to eight specific designations on which it sought changes. Of these, we have been informed that the proposed final plan for management of the CDCA recommended five of these WSA's as nonsuitable for wilderness designation. Insofar as the three other units which were determined to be fully suitable (No. 263), 80 percent suitable (No. 150), and 35 percent suitable (No. 325), the State's objection was premised on various leases or permit application for borates, tungsten, and uranium. With respect to these three units, we merely note that the State has not shown that adequate access consistent with full economic development of state inholdings is unavailable. In the absence of a specific denial of access, any injury must be seen as purely speculative.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski

Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

